



CHAIRMAN

Federal Communications Commission

Washington, D.C.
April 2, 2004

The Honorable Edward J. Markey
U.S. House of Representatives
2108 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Markey:

Thank you for your February 23, 2004 letter in which you ask a series of questions about consumer issues currently being addressed by the Commission. I appreciate your concern about the effect of off-shore outsourcing of many telecommunications functions on the privacy of American consumers. I am pleased to transmit responses to your specific questions below.

- *Section 222 of the Communications Act of 1934, as amended – “customer proprietary network information” (“CPNI”) regulations.*

1 (A). Do the Commission’s rules implementing Section 222 permit the disclosure of CPNI by a telecommunications carrier to entities or persons operating in territories outside of the United States?

U.S. domestic carriers are required to follow Section 222 and the Commission’s implementing rules designed to protect consumer privacy. *See* 47 U.S.C. § 222; 47 C.F.R. § 64.2001 *et seq.* Nothing in our rules prohibits the otherwise lawful disclosure of CPNI by a telecommunications carrier to entities or persons operating in territories outside of the United States.

1 (B). If so, what enforcement limitations may result for the Commission if CPNI data is permitted to be disclosed to entities operating overseas if violations to CPNI occur as a result of impermissible disclosures by that offshore entity?

Section 222 and the Commission’s implementing rules focus on disclosure requirements/restrictions for carriers, and not the recipients of a CPNI disclosure. *See* 47 C.F.R. §§ 64.2005, 64.2007, and 64.2009. U.S. domestic carriers are, however, required to follow the disclosure safeguards prescribed in the Commission’s rules, regardless of whether overseas entities are involved. For instance, a telecommunications carrier that discloses or provides access to CPNI to its joint venture partners or independent contractors is required to enter into confidentiality agreements with those independent contractors or joint venture partners that:

- (1) require that the independent contractor or joint venture partner use the CPNI only for the purpose of marketing or providing the communications-related services for which that CPNI has been provided;
- (2) disallow the independent contractor or joint venture partner from using, allowing access to, or disclosing the CPNI to any other party, unless required to make such disclosure under force of law; and
- (3) require that the independent contractor or joint venture partner have appropriate protections in place to ensure the ongoing confidentiality of consumers' CPNI.

U.S. domestic carriers are subject to enforcement action for failure to follow these and other safeguards when disclosing CPNI to offshore entities to provide marketing, billing or other services. In addition, Section 217 of the Act establishes a carrier's liability for any acts or omissions of its agents, regardless of location.

- *Section 631 of the Communications Act of 1934, as amended – privacy protections for consumers with respect to cable operator service.*

2 (A). Is the Commission aware of practices in the cable industry that involve moving customer service support or billing operations overseas?

The Commission is not aware of any cable television system operators who have moved their customer service support or billing operations overseas. The cable television industry, however, is not required to provide the Commission with information concerning the location of customer service or billing operations.

2 (B). Does the Commission believe disclosures of personal information in violation of Section 631 in cases where violations occur off-shore thwarts or unduly hampers enforcement remedies contained in Section 631?

As you might be aware, the Commission has not promulgated regulations to implement Section 631 because the statute provides for enforcement by the appropriate federal court. Nonetheless, it does not appear that enforcement of the privacy rights granted to cable subscribers pursuant to Section 631 would be impeded because the alleged violation may have occurred off-shore.

- *The Commission's "Do-Not-Call" list database.*

3 (A). Is the Commission aware of telecommunications carriers or other entities within the Commission's jurisdiction moving their telemarketing operations off-shore?

The Commission's Enforcement Bureau has been aware of occasional anecdotal reports that some telemarketing calls received within the United States originate in foreign locations. It does not, however, have any documentation concerning the movement of telemarketing operations by telecommunications carriers or other entities to off-shore locations.

3 (B). Does the Commission have sufficient authority to enforce violations of the Do-Not-Call rules by foreign telemarketing entities operating off-shore? Does the Commission have sufficient authority to enforce violations of the Do-Not-Call rules on telemarketing entities operating off-shore if such entities are performing such telemarketing on behalf of a U.S.-domiciled company or entity?

The Commission has sufficient authority to enforce the Do-Not-Call rules against both foreign telemarketing entities and U.S.-domiciled entities operating off-shore. Nonetheless, it would be helpful for Congress to amend Section 227 to specify explicitly our authority in this area in order to remove any opportunity for companies to question that authority.

Section 227(c) of the Communications Act confers upon the Commission authority to implement Do-Not-Call rules "to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." Section 227 does not limit the reach of the Commission's Do-Not-Call rules in terms of the location of either foreign or U.S. entities operating off-shore. Further, the broad jurisdiction granted by Section 2 of the Communications Act¹ supports the enforcement of Do-Not-Call restrictions against off-shore telemarketing activities. The Commission's Do-Not-Call rules, 47 C.F.R. § 64.1200(c)-(d), reflect this broad jurisdiction, stating that "no person or entity" shall engage in various enumerated proscribed telemarketing activities, including placing telemarketing calls to residential telephone lines contained in the national Do-Not-Call database. Thus, we believe the Commission has broad authority to enforce the Do-Not-Call rules against any person or entity, including both foreign and U.S.-domiciled companies operating off-shore. Nonetheless, Section 227 does not explicitly address off-shore activities with respect to Do-Not-Call matters as it does regarding fax advertising and other telemarketing activities such as use of automatic telephone dialing systems and artificial or prerecorded voice messages (see 3(D), below).

3 (C). Has the Commission initiated or succeeded in bringing any enforcement action against off-shore telemarketing operations in violation of the Commission's rules in the last 3 years?

¹ Section 2 provides in pertinent part that the FCC has jurisdiction over "all interstate and foreign communication by wire or radio, and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States." See 47 U.S.C. § 152(a). The Commission's Do-Not-Call rules also apply to intrastate communications. See *id.* § 152(b) (the general prohibition on Commission authority over intrastate communications does not apply, *inter alia*, to Section 227 of the Act).

The Commission has not taken any enforcement action involving off-shore telemarketing operations, because there has been insufficient evidence to-date of rule violations by off-shore telemarketing operations.

3 (D). Does the Commission have sufficient authority to enforce provisions of Section 227 of the Communications Act of 1934 (47 U.S.C. 227) governing the use of facsimile machines, computers, or other devices for transmitting unsolicited “junk faxes” if such transmissions originate off-shore? 3 E. Has the Commission successfully enforced such provisions against the off-shore origination of junk faxes in the past? How many complaints has the Commission received in the last 3 years with respect to unsolicited facsimiles?

Yes, the Commission has sufficient authority to enforce the Section 227 restrictions governing transmission of unsolicited fax advertisements if transmission of such faxes originates off-shore. Section 227(b)(1)(C) of the Communications Act provides that “[i]t shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.”² In addition to targeting unsolicited fax advertisements, Section 227(b)(1) also broadly prohibits certain calls that use an automatic telephone dialing system or an artificial or prerecorded voice.

The Commission has initiated one enforcement action against a foreign company that claimed its faxes originated off-shore. In January 2002, the Commission imposed a \$1,107,500 forfeiture against a British company, 21st Century Fax(es) Ltd., for sending unsolicited advertisements to telephone facsimile machines in violation of Section 227(b)(1)(C) of the Communications Act and the Commission’s parallel rules. This action was taken pursuant to the original provisions of Section 227(b)(1), which held it unlawful for “any person within the United States to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.” The Commission rejected 21st Century’s claims that it was not subject to this prohibition because its faxes were sent from the United Kingdom or, alternatively, because its headquarters are within the UK. The Commission held that Section 227(b)(1)(C)’s language targeting activities “within the United States” covers faxes sent to the United States from off-shore locations so long as the sender has a presence in the United States, and that 21st Century’s systematic and continuous contacts in the United States were sufficient to establish a presence for jurisdictional purposes.³ 21st Century has not paid the forfeiture. In mid-2002 the Commission referred this case to the Department of Justice for collection.

From January 2001 through mid-March 2004, the Commission received 24,243 complaints about unsolicited faxes. The Commission has initiated numerous enforcement

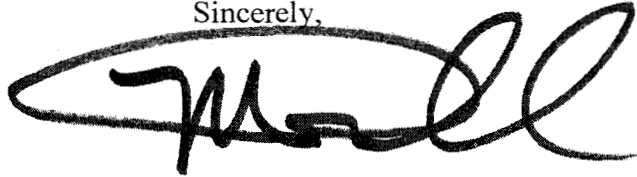
² This language reflects amendment by section 12 of the CAN-SPAM Act of 2003 (adding to section 227(b)(1) the phrase “or any person outside the United States if the recipient is within the United States”).

³ This order was issued prior to the recent amendment to Section 227(b)(1)(C) described in footnote 2.

actions against entities that have sent unsolicited fax advertisements. From January 2001 through December 2003, Commission staff has issued 167 citations for such violations, and the Commission has imposed forfeitures against six companies totaling over \$6.9 million.

Your interest in these very important issues is appreciated and I hope that this information is helpful.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Powell", enclosed within a large, horizontal oval loop.

Michael K. Powell